No. 57196-0-II

IN THE WASHINGTON STATE COURT OF APPEALS, DIVISION II

Terry L. Kincer
Appellant,

vs.

State of Washington
Respondent.

Appellant's Reply Brief

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ARGUMENT

A. The State confuses the timing of Mr. Kincer's conviction.

Throughout its briefing, the State repeatedly cites Mr. Kincer's "1992" conviction. Mr. Kincer does have a 1992 conviction, but it does not form the basis for these proceedings. RCW 9.41.040(2)(a)(i) prohibits possession of a firearm only for offenses that were committed on or after July 1, 1993.

The petition Mr. Kincer filed with Jefferson County Superior Court lists his predicate as a domestic violence assault that occurred in 1997. Clerk's Papers (CP) at 1-2. While this is a small error, it is a preview of the State's pervasive and total lack of attention to detail on the issue presented.

The State also accuses Mr. Kincer of "not deny[ing] there is a federal prohibition on his possession of firearms." Response at 2. Mr. Kincer vehemently denies this, but the Court does not need to resolve that issue, so no ink was spilled on something that is irrelevant.

B. Federal preemption does not apply because Mr. Kincer did not ask the trial court to violate federal law.

The State spends the first portion of its response brief trying to convince this Court that federal preemption is a real concept. Response at 6. This was covered in first year of law school and Mr. Kincer has never argued otherwise. Mr. Kincer did not ask the trial court to perform any action that would violate federal law. Restoring *state* firearm rights does not violate or implicate federal law. There is no authority for such an argument. Mr. Kincer did not ask the trial court to restore his rights under federal law, to grant him immunity from federal prosecution, to order that he be approved for a concealed pistol license, or to order that he be approved for a firearm transfer.

The Ninth Circuit has already acknowledged that federal and state firearm rights are distinct concepts in *Mai v. United States*, 952 F.3d 1106, 1110 (9th Cir. 2020):

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> As a result of Plaintiff's involuntary commitment, Washington law prohibited him from possessing a firearm. Washington law, though, allows persons to petition for relief from that prohibition if they meet certain conditions. In 2014, Plaintiff successfully petitioned a Washington state court for relief. . . . *Accordingly, the relevant state law no longer prohibits Plaintiff from possessing a firearm. But, as a result of his involuntary commitment, federal law prohibits Plaintiff from possessing a firearm.*

(emphasis added). Despite citing 59 different cases from various state and federal jurisdictions in its 70+ page brief, the State deliberately fails to cite *Mai*.

It is possible for the trial court to comply with federal law in this context because federal law is not implicated in a *state* restoration. Mr. Kincer is entitled to that relief under RCW 9.41.040(4), much like the Ninth Circuit recognized the plaintiff in *Mai* was entitled to a state restoration under RCW 9.41.047.

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C. The State's cross-country case law tour is inapposite.

1. Washington.

The State begins its journey, fittingly, in Washington. Response at 18. To deflect Mr. Kincer's argument that Washington courts have repeatedly shot down prosecutorial attempts at narrowing the firearm restoration statute, the State touts its prized win - *State v. Mihali*, 152 Wn. App. 879, 218 P.3d 922 (2009). Response at 18. But, in yet another display of its failure to pay attention, the State doesn't realize that *Mihali* was overruled by implication in *Rivard v. State*, 168 Wn.2d 775, 231 P.3d 186 (2010), even though it went on to cite *Rivard* on page 23.

The State then goes on to criticize the other cases cited in Mr. Kincer's opening brief because none of those cases discuss federal preemption. Response at 19-29. A thorough analysis of each case was provided in the opening brief and an encore is not necessary here because those cases were never cited for that purpose anyway. The State likewise fails to cite any

Washington case that supports federal preemption in this context.

One cited case is relevant, though. *Barr v. Snohomish County Sheriff* - cited by both parties - supports Mr. Kincer, not the State. 193 Wn. 2d 330, 440 P.3d 131 (2019). There, the Washington Supreme Court held that Mr. Barr was not entitled to the issuance of a concealed pistol license (CPL) because he was prohibited by federal law. *Id.* But the issue litigated is the crucial factor. Mr. Barr was not seeking the restoration of his *state* rights. He was seeking a writ that would direct the Snohomish County Sheriff to issue him a CPL. The CPL statute, RCW 9.41.070, explicitly requires consideration of federal law in that context. RCW 9.41.070(1)(a). RCW 9.41.040(4) contains no such directive.

The State is putting the cart before the horse. If Mr. Kincer were denied a CPL or firearm transfer and filed a writ against the Jefferson County Sheriff, then the Sheriff could invoke federal law like the Snohomish County Sheriff did in

Barr. None of that has occurred, so the State's argument in this matter regarding preemption is misplaced and unripe.

2. Sister states.

The State first cites *Bergman v. Caulk*, 938 N.W.2d 248 (Minn. 2020). Response at 30. That case does not support the State's argument because Bergman was not seeking restoration of state rights under Minnesota state law. He was seeking a writ of mandamus directing a local county sheriff to issue him a concealed carry permit. Minnesota law directed consideration of federal law in that context, just like Washington state law directs. *Bergman* is exactly like *Barr*, and - just like *Barr* - supports Mr. Kincer, not the State.

The State next cites *In re Parsons*, 218 W. Va. 353, 624 S.E.2d 790 (2005). Response at 32. There, the Supreme Court of Appeals of West Virginia denied restoration of state firearm rights to an individual convicted of domestic violence. What the State conveniently fails to mention, however, is that West

Virginia's firearm restoration statute explicitly states that "the court may enter an order allowing the person to possess a firearm *if such possession would not violate any federal law*." 624 S.E.2d at 793 (emphasis added). The restoration statute in WV requires deference to federal law, RCW 9.41.040(4) does not.

The State then cites *State ex rel. Suwalski v. Peeler*, 2020-Ohio-3233, 155 N.E.3d 47 (Ct. App. 2020). Response at 32. The issue presented in that case was phrased by the Ohio Court of Appeals as "[The victim of a DV offense] seeks a writ of prohibition to prevent [a state judge] from relieving [the applicant] of the federal firearms disability imposed upon him under 18 USC 922(g)(9)." 155 N.E.3d at 49-50. The court concluded that "Judge Peeler does not have the judicial power under Ohio law . . . to relieve Ewing of the federal firearms disability imposed upon him." *Id.* at 50. In a footnote, the court also stated that "[t]his case does not address whether Judge Peeler had the judicial power to relive Ewing of any state

firearms disability." *Id.* at 50 n.2.[1] Mr. Kincer did not request the trial court relieve him of any federal prohibition. Mr. Kincer requested only that the trial court relieve him of the Washington state prohibition.

Next, the State cites *Pa. Police v. McPherson*, 831 A.2d 800 (Pa. Commw. Ct. 2003). Response at 33. This case is yet another instance of the applicant suing a police agency over the denial of a carry permit. In issuing a carry permit, Pennsylvania statute 18 Pa.C.S. § 6109 directs the local sheriff to "conduct a criminal background, juvenile delinquency or mental health check following the procedures set forth in section 6111 (relating to firearm ownership)." *Id.* at 803. In turn, section 6111 explicitly requires Pennsylvania State Police to investigate

[1] This footnote also cites *Terry v. Ohio*, 2017-Ohio-7805, 2017 WL 4232560. The *Terry* case holds that firearm restoration under Ohio state law is not available to misdemeanants because misdemeanants aren't prohibited from possessing a firearm under Ohio state law, not even when domestic violence is involved. This is likely why the applicant in *Suwalski* asked a state judge for relief from the federal prohibition, because no state prohibition existed anyway.

crimes of domestic violence for a possible prohibition under federal law. *Id.* at 803-04. This is - again - just like *Barr*. It supports Mr. Kincer, not the State. RCW 9.41.040(4) requires no deference to federal law.

Then, the State cites *James v. California*, 229 Cal. App. 4th 130, 176 Cal. Rptr. 3d 806 (2014). Response at 33. In that case, the applicant sought a writ of mandamus and a determination that his predicate conviction under California state law did not meet the federal definition of "misdemeanor crime of domestic violence." *Id.* at 134-35. The California Court of Appeals held that it did. Restoration of rights, state or federal, was never at issue.

Next, the State cites *State v. Wahl*, 365 N.J. Super. 356, 839 A.2d 120 (Super. Ct. App. Div. 2004). Response at 34. That case had to do with the propriety of returning firearms to an individual. The court held that the firearms could not be returned to Mr. Wahl because his predicate conviction in New Jersey met the federal definition of misdemeanor crime of

domestic violence. *Id.* at 360. The court concluded that New Jersey law should be read *in pari materia* with federal law, and that preemption did not apply. *Id.* Again, this presented an issue where a court had previously directed the actual transfer of a firearm, not the restoration of a state right.

Then, the State cites *Coram v. State*, 2013 IL 113867, 375 Ill. Dec. 1, 996 N.E.2d 1057 (2013). Response at 37. The State attempts to convince this Court that it should follow the dissent instead of the lead opinion, but dissents don't make law. The *Coram* decision does have some dubious language that "[r]elief granted pursuant to statutory review *removes* the federal firearm disability," *id.* at ¶ 75, but Mr. Kincer did not request such relief from the trial court, so this errant language is ultimately inconsequential to the issue presented.

The State ends its voyage in Virginia by citing two cases. Response at 39. Both cases are issued by the same circuit court judge. These are not appellate opinions and are of no precedential value, even in Virginia, much less Washington.

First, *In re Concealed Weapon Permit*, 106 Va. Cir. 64 (Cir. Ct. 2020), is yet another case about the issuance of a concealed carry permit. Virginia state law provides a laundry list of reasons to deny such a permit, one of them being if the applicant "is ineligible to possess a firearm pursuant to [VA state law] or the substantially similar law of any other state or of the United States." Va. Code § 18.2-308.09(1). In other words, Virginia state law deferred to federal law as one basis to deny a permit. The decision is irrelevant for the same reason as all the other cases where the issue is the approval of a permit or firearm transfer.

Finally (and mercifully), the State cites a case that is on point. In *In re Minifield*, 109 Va. Cir. 233 (2022), the judge denied a petition to restore firearm rights under Virginia state law due to federal preemption. In it, the court concluded that it "finds good cause to restore the Petitioner's right to possess a firearm under Virginia law but is prohibited from doing so under the Supremacy Clause of the United States Constitution."

Id. at 238. A crucial part of the court's ruling is that Virginia state law grants courts discretion to grant or deny a petition to restore firearm rights: "The court may, in its discretion and for good cause shown, grant such petition and issue a restoration order." Va. Code § 18.2-308.2(C). Washington's firearm restoration statute is nondiscretionary. *State v. Swanson*, 116 Wn. App. 67, 65 P.3d 343 (2003).

Despite its exhaustive effort, a careful review of the State's authority reveals nothing persuasive. Each case either applies the Lautenberg Amendment in a different context than the one presented here, is of no precedential value even in the originating state, or is decided within a statutory scheme that is significantly different from Washington's scheme. But the State has not shown what application the Lautenberg Amendment has in this context where Mr. Kincer seeks restoration of a state right pursuant to a state law that requires no deference to federal law and imparts no discretion on the trial court to deny the petition.

D. Mr. Kincer's only position is that his federal status is irrelevant to these state proceedings.

The State goes on a diatribe about how Mr. Kincer waived any argument that his "1992" conviction is not a misdemeanor crime of domestic violence under federal law. Response at 40. But Mr. Kincer's ultimate position - then, now, and always - isn't whether his 1997 conviction meets the definition under federal law, it is that this determination is irrelevant to these proceedings.

The opening brief's discussion at 10-12 is meant to illustrate the State's incompetence and haphazard approach, not present a substantive case that Mr. Kincer's conviction does not meet the federal definition. Mr. Kincer need not present such a case because it is the State's burden as the objecting party and because it's irrelevant in any instance. The State now attempts to shift the burden to Mr. Kincer to prove a negative. But it is the State that raised federal law as an objection. Therefore, the burden of proof and persuasion lies with the State to prove that

the federal prohibition applies. It never attempted to do so below. Given that the State has now made a feeble attempt at this, response at 43-59, a reply is in order.

1. The State can't prove the "force" element.

The State correctly cites *United States v. Castleman*, 572 U.S. 157 (2014), and Washington state's common law definitions of assault, yet somehow comes to the conclusion that all of Washington's definitions of "assault" categorically meet the requirement stated in *Castleman*. Response at 43-53.

Castleman says that 18 USC § 922(g)(9)'s physical force requirement is satisfied by the degree of force that supports common law battery - namely, offensive touching. *Castleman*, 572 at 162-63. Washington, however, has three categories of assault: "assault encompasses (1) an attempt, with unlawful force, to inflict bodily injury upon another; (2) an unlawful touching with criminal intent; and (3) putting another in apprehension of harm whether or not the actor intends to inflict

or is incapable of inflicting that harm." *State v. Jarvis*, 160 Wn. App. 111, 117-18, 246 P.3d 1280 (2011). In other words, only the first and second definitions could meet the federal definition of common law battery. The third definition (putting another in apprehension of harm) is insufficient. How the State ultimately concludes that all assaults in Washington state meet the federal requirement of force is inexplicable. And without proof that Mr. Kincer was convicted of using the first or second definition of assault, the State's claim fails.

2. The State can't prove the "relationship" element.

The State argues that the Court should apply the state definition of "domestic violence" as it existed in 1992. Response at 54-59. Again, the predicate offense that led to this action occurred in 1997, but the State's argument fails regardless of what version of the definition is used.

Accepting the State's recitation of the relationship tests in both 18 USC § 921(a)(33)(ii), response at 54, and former

RCW 10.99.020(3) (1991), response at 56, a person could have committed a state "domestic violence" offense in 1992 that does not meet the relationship test under federal law. Former RCW 10.99.020(3) included "adult persons related by blood or marriage, and adult persons who are presently residing together or who have resided together in the past."

Not all adults related by blood or marriage meet the relationship test under federal law. Siblings don't. Cousins don't. Nephews don't. Parent on adult child does, but adult child on parent does not. The list goes on. Likewise, the state definition in 1992 didn't require that adult persons residing together be in an intimate relationship, so the State's **bold** attempt at disproving the opening brief at 12 regarding adult roommates falls flat. Response at 55. Platonic roommates do not meet the federal definition.

Without proof of the relationship between Mr. Kincer and his victim, the State's claim fails.

CONCLUSION

Based on the foregoing, this Court should reverse and remand with instructions to issue an order restoring Mr. Kincer's firearm rights under RCW 9.41.040(4).

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Respectfully submitted,

Vitaliy Kertchen #45183
Date: 11/22/22

DECLARATION OF SERVICE

I, Vitaliy Kertchen, being of sound age and mind, declare that on 11/22/22, I served this document on the Jefferson County Prosecutor by uploading it using the Court's e-filing application and emailing a copy of the document using that process to all registered users.

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_____

Vitaliy Kertchen #45183
Date: 11/22/22
Place: Tacoma, WA

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